JD(ATL)–63–04
Milwaukee, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HENSHUE CONSTRUCTION, INC.

and Case 30–CA–16818–1

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 2150

Andrew S. Gollin, Esq., for the General Counsel.
Thomas P. Godar, Esq., for the Respondent.
Mr. Joseph Koehler for the Charging Party.

DECISION

Statement of the Case

George Carson II, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on October 20, 2004.[1] The charge in Case 30–CA–16818–1 was filed on May 4 and was amended on June 18. The complaint issued on June 29. The complaint alleges that the Respondent violated Section 8(a)(5) of the National Labor Relations Act by failing and refusing to sign an agreed upon contract. The Respondent's answer denies that it violated the Act. I find that there was a meeting of the minds regarding the contract, thus the Respondent was obligated to sign it.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, Henshue Construction, Inc., the Company, a corporation, is engaged in the business of water and sewer, electrical, and telecommunications construction from its offices in Madison, Wisconsin, at which it annually purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of Wisconsin. The Respondent admits, and I find and conclude, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that the International Brotherhood of Electrical Workers, Local 2150, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in the year 2004 unless otherwise indicated.

II. Alleged Unfair Labor Practices

A. Background

The Company has collective-bargaining agreements with several unions including the Union (IBEW Local 2150), the Operating Engineers, and the Laborers. In the late 1990's, telecommunications work performed by the Company began expanding. A typical crew of three to five employees performing this work could include employees represented by each of the foregoing unions. Disputes arose concerning the appropriate jurisdiction of the foregoing unions regarding the telecommunications work. The disputes were ultimately resolved when the Regional Director determined that a separate appropriate unit of employees engaged in telecommunications work was appropriate. Neither the Operating Engineers nor the Laborers "wished to participate" in the election in that unit. On October 31, 2000, the Union was certified as the exclusive collective bargaining representative of employees in the following appropriate unit:

> All construction employees, including general foremen, employed by Respondent in its telecommunications division in the State of Wisconsin, excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.

Following the certification, the Company and Union entered into negotiations which, after two or three face-to-face meetings, various exchanges of documents, and several telephone calls, resulted in a collective-bargaining agreement signed on February 8, 2001, which was effective through December 31, 2003. Chief spokesman for the Union in those negotiations was Business Representative Joseph Koehler. The Company was represented by its President, Gary Henshue, and an attorney, Michael Auen, who is associated with the law firm of Foley and Lardner in Madison, Wisconsin.

On May 29, 2002, Koehler wrote Henshue requesting that the agreement be amended by adding a sentence requested by the International Union. On May 31, 2002, Attorney Auen wrote Koehler with different language that was amended into the agreement. On July 1, 2003, the health insurance carrier increased premiums to $3.25 per hour worked. On September 12, 2003, Koehler wrote the Company requesting that it pay the increase but acknowledging that under the contract it was not obligated to do so and, if it chose not to pay the increase, to deduct the additional premium from the pay of employees so their coverage would not lapse. It appears that the Company paid the increased premium.

Koehler and Henshue agree that their relationship was amicable. All issues that arose were resolved by discussion. No grievances were filed. In 2001, the unit consisted of over 100 employees. A significant reduction in telecommunications work resulted in diminution of the unit to fewer than 10 employees in late 2003 and early 2004.

B. Facts

On October 28, 2003, Business Representative Koehler wrote President Henshue the following letter:

> Please be advised that this letter shall serve as notice of our desire to renegotiate the Henshue Construction, Inc., Teladata [sic] Agreement per Article 1, Section 1.02.
>
> The nature of the changes shall include but not be limited to the following:

1. Change the dates to reflect a new two-year agreement.

2. Revise the referral language in Article 3 to reflect the language shown in the District Sound and Communications Agreement Guide.

3. Revise the language in Article 6, NEBF [National Electrical Benefit Fund], to reflect the language shown in the District Sound and Communications Agreement Guide.

4. Change the Lineco [Line Construction Benefit Fund] contribution rates to reflect $3.75 per hour on 1-1-04 and increasing to $4.25 per hour on 7-1-04. Also include any other increases through the duration of the agreement. Include language that allows for a payroll deduction if required contributions exceed the amount in the agreement.

5. Eliminate the reference to dates of the Power Agreement in Article 9, Section 9.02.

6. Increase the NEAP [National Electrical Annuity Plan] contribution amount to 10% on 1-1-04 and to 12% on 1-1-05.

7. Increase all wage rates back to the published rates in the Agreement prior to the Lineco reduction implemented in 2003 and then increase by 3% each year of the agreement.

8. Create a new Article 13 “Apprenticeship and Training” and include a contribution to the Great Lakes Training Trust Fund of .75% of gross payroll.

The union reserves the right to amend, modify, add to, or withdraw any of these proposals at any time. No agreement is final until approved by the International. No portion of these proposals shall be deemed a waiver of any existing rights; all proposals regarding existing rights are merely attempts to codify existing conditions.

On October 30, 2003, Thomas Henshue, brother of President Gary Henshue, wrote the Union stating that the Company desired “to terminate” its agreement with the Union. Thomas Henshue joined the Company in 2001. Prior to that he had worked as an attorney with Foley and Lardner, the same firm with which Michael Auen was associated. Although testifying that, after joining the Company, he “interfaced with a number of unions,” Thomas Henshue acknowledged that he consulted outside counsel concerning “labor related issues.” For a period of time, Thomas Henshue had handled the telecommunications aspect of the business of the Company. Prior to late October, President Gary Henshue had advised Koehler that his brother was no longer handling telecommunications. Thus, upon receipt of the letter, Koehler called President Gary Henshue regarding the letter. Henshue informed him that the Company did not want to terminate the agreement, that his brother thought that was the way “to enter new negotiations.” Thereafter, all of the dealings between the parties were between Koehler and President Gary Henshue, and all references herein to Henshue refer to Gary Henshue.

Koehler asked whether Henshue would be interested in joint bargaining with two other companies that performed telecommunications work. Henshue replied that he would not. Henshue stated that he no longer retained attorney Auen and that he would not be using an attorney. He stated that he did not have any proposals.

Henshue agrees that he informed Koehler that he would be negotiating without an attorney but contends he did so when they met. He testified that, when they met, on January 19, Koehler asked where Mike Auen was. Henshue recalled stating that he would not "have counsel at this first meeting." Henshue did not recall whether he explained why he was not using an attorney. At the hearing he explained that the Company was "trying to save money" and that it could not afford "to pay the attorneys we had." Despite this, he asserts that he stated to Koehler that he would have an attorney review any proposed agreement. Koehler denies that Henshue said anything about having the agreement reviewed by an attorney.

On January 19, Koehler and Henshue met at the Company's offices. The meeting lasted approximately an hour and a half. Regarding items 1, 7, and 8 in the Union's proposal, Koehler and Henshue agreed to a two-year term for the contract and that wages would be frozen for the first year with a wage reopener for the second year. They also agreed that the Company would contribute to the Great Lakes Training Trust Fund.

The parties dispute whether agreement was reached upon the five remaining proposed changes, three of which relate only to language.

Koehler presented to Henshue the District Sound and Communications Agreement Guide, which contained suggested language from the International Union regarding the priority of referrals among four categories of employees. The initial agreement had not set out the criteria for inclusion in each of the separate categories. Henshue made a copy of this language. The referral provisions were not affected. Koehler testified that Henshue had "no problem with that whatsoever." Henshue testified, "I made a copy of this and we were going to go back and talk about it." Henshue did not testify to whom "we" referred, nor did he assert that he informed Koehler of his intention to "talk about it."

Koehler also presented the language from the District Sound and Communications Agreement Guide regarding the language relating to the National Electrical Benefit Fund, NEBF. He explained that the there was no impact regarding the payments made by the Company, that it "was just making the contract language uniform" and that Henshue "agreed to that." Henshue testified that he "didn't say anything. I didn't have any feedback because it's the first time I had seen it and I wanted to have other people look at it."

Koehler also proposed eliminating the reference to the power agreement by date, referring simply to the current agreement, so that the reference need not be changed in future agreements and that Henshue agreed that it "did simplify things and it made sense so he agreed to that." Henshue testified that he did not "understand what this power agreement reference was for in our contract but I know Mike Auen fought hard for it when we did it … and there's a reason we had that in there." He did not testify that he informed Koehler what he did not understand about that reference which, as stated in Article 9, provided that employees would be paid pursuant to the Outside Power Agreement when performing "electrical work … not covered by this [the Teledata] Agreement."

The two economic proposals related to insurance and pension. Health insurance, under the prior agreement, was through the Line Construction Benefit Fund (Lineco). Lineco had, as already noted, increased its rates in 2003 and had announced a further increases in rates. Henshue recalled that Koehler told him that if he could "come up with a better deal [than Lineco] you should do that." Although Henshue acknowledged that he was aware of insurance costs being paid for the "corporate office staff," it would appear that those costs were not a "better deal" because he made no counterproposal. Koehler testified that Henshue agreed to pay the

increases and that, consistent with the agreement to freeze wages subject to a wage reopener for 2005, they "agreed to include Lineco … in the wage reopener for the following year."

The National Electrical Annuity Plan (NEAP), is a defined contribution that is paid by the employer. Under the expired agreement, the Company was contributing 8%, and Koehler requested that the company increase its contribution to 10% in 2004 and 12% in 2005. He informed Henshue the Company's competitors were already paying 12% and that the Union wanted the Company "to catch up with them." Koehler testified that Henshue "did ultimately agree to those contribution increases." Henshue acknowledged that he had been unaware that his competitors were paying more, but denied agreeing to the rates, testifying that "we left it unresolved. We did not resolve that."

The meeting ended with a handshake. Koehler recalls that Henshue stated, "I'm glad we could agree to this." Koehler said that he would make the appropriate changes and get an updated version of the contract to him for signatures. Henshue did not specifically deny making the foregoing statement, but he did testify that he stated that he would "have an attorney approve anything that I ended up signing." The attorney was not named. As already noted, Koehler denies that an attorney was mentioned.

Henshue obtained an electronic copy of the prior agreement from attorney Michael Auen and e-mailed it to Koehler. It appears that he still considered Auen to be his attorney because he testified, "I had to call our attorney, and have him e-mail it to me …." Koehler incorporated the changes to which the parties had agreed and made a list of those changes. On February 3, he wrote Henshue stating that he was enclosing the "updated copy of the Teledata Agreement" including a separate listing "of the negotiated changes" which had been incorporated into the agreement. The introductory paragraph to that listing, dated February 2, states: "Listed below are the negotiated changes agreed to and updated in the Henshue Teledata Agreement." He included separate signature pages and requested that "[i]f everything is acceptable," Henshue sign and return the document. In mid-February, Koehler realized that he had not received the signed contract or heard from Henshue. He began calling him, leaving voice mail messages.

In late February or early March, Henshue returned Koehler's calls and informed him that he had retained "a new law firm and he wanted them to review the changes to the contract before he signed it." Koehler responded that he was frustrated "because I was under the understanding that we did have an agreement," that Henshue "had never made an issue out of anything." Henshue agrees that Koehler was frustrated, but testified that the frustration was "because he wanted to get the negotiations further along."

A few weeks later, on March 18, Henshue sent by facsimile, a two-page memorandum dated March 9 that he had received from the new law firm that the Company had retained. Henshue testified that his brother had made the approach to the new firm. The memorandum addressed several points, including language in the original contract to which no changes had been proposed. Koehler, from an airport, called Henshue and discussed several of the matters, including specifically the health insurance. Koehler stated that he could not believe that there was a question regarding Lineco because "we talked about it and -- and you agreed there were no other alternatives on it, … and you were in full agreement." Henshue answered, "I know but what I'm looking for is clarification." Henshue denied that Koehler ever stated that the parties had "a full blown collective-bargaining agreement." He did not deny telling Koehler that what he was looking for was "clarification."

On April 13, Koehler and Henshue met at the Company office. No attorney was present. The meeting lasted about a half hour. Koehler brought with him the contract that he had sent

Henshue on February 3, the Sound and Communications Guide, and the document from the law firm that Henshue had forwarded him by facsimile copy. They went through the document. Regarding health insurance, Koehler noted that there were no alternatives and pointed out that one of his competitors had proposed obtaining its own insurance but that it was a substandard plan and the Union would not agree to that. Henshue commented that he did not see how the competitor thought that he could obtain insurance for less, that "Lineco was the cheapest thing that was out there." Henshue did not deny making the foregoing comment.

Henshue said there was "no problem" regarding language unchanged in the original agreement relating to the jurisdiction of "inside" local unions, that "he just needed some clarification for his lawyer."

Although there had been no change in the actual referral procedure, the memorandum raised that issue. Koehler explained that the language change defining the categories from which the Union referred had "no impact whatsoever on referral." Henshue questioned whether he could call back a specific employee, and Koehler explained that if he had anybody that he wanted back "they would have to sign the referral book and [be] sent out according to the agreement." Henshue confirms that Koehler explained that "those guys would have to get in the IBEW book." He testified that he "didn't tell him [Koehler] I agreed or disagreed with that." The referral procedure had not been changed, and there had been no discussion of the procedure on January 19. The only change had been the setting out of the categories from which employees were referred, a copy of which Henshue had made on January 19 and which had been set out in the documents sent to Henshue on February 3.

There was discussion of a new classification of crew leader who would be paid less than a foreman. Koehler stated that, if that were to be agreed to in negotiations with Henshue's competitors, the Union would include that in a side letter. Henshue did not deny that he stated that "he was fine with that." Koehler testified that that the reason he addressed that matter with a side letter was "because we already had an agreement …."

Koehler did not recall that Henshue requested copies of any plan documents, but believed he may have asked for a current copy of the Lineco benefit booklet. Henshue testified that he requested the employees' benefit agreement and trust agreement, that the new attorney had asked for that and that he was "following up." Koehler assured Henshue that the Company would have no liability if it withdrew from any of the funds so long as the Company was "paid up in full when he left." Henshue acknowledged that Koehler assured him that the plans were financially sound and, "I think in his mind that was satisfactory to me." Henshue made no statement to Koehler that would have altered the perception that Koehler believed that he had clarified matters to Henshue's satisfaction. The request for documents made pursuant to the request of the attorney is immaterial regarding any previous agreement made by Henshue.

Regarding the Great Lakes Training Trust Fund, Koehler recalls commenting that he could not believe that Henshue had not explained that to the new attorney because he had been involved in the creation of the fund. Henshue replied, "I know but you know how lawyers are. They always have a question about something,"

Koehler recalls that the meeting ended with Henshue stating that he was glad that we were able to "resolve this" and "I should be able to take care of the signatures and get it in the mail to you by the end of the day." No changes were made to the agreement that had been reached on January 19. Koehler denied that Henshue said anything about contacting the attorney. The signed agreement was not returned. Koehler began calling Henshue the end of the week, and "left another series of voice mails." Henshue never returned any of those calls.

On April 27, a decertification petition was filed. On May 4 the Union filed the charge herein.

Henshue testified that he informed Koehler that he needed to take the memorandum back to his attorney. He acknowledged that he did state to Koehler that he "didn't think it would take too long to get back to him." He did not testify that he took the memorandum back to the attorney. He admitted that he did not get back in touch with Koehler because he was involved in financing negotiations that culminated the end of that week and "it just was not a big priority for us."

Documentary evidence establishes that the Company began making the payments to which Koehler testified the parties agreed in January. The Respondent introduced a memorandum from Lineco advising all participating employers of the January 1 increase in premium to $3.75 an hour. Henshue testified that the payments were a clerical error, that when payroll clerk Sue Schuchardt received the memorandum she simply complied with it. General Counsel's Exhibits 18(c) through (h) reflect that, after the week ending January 3, i.e. from January 4 through March 20, the Company paid the 10% rate to which Koehler testified the parties agreed on January 19 to the National Electrical Annuity Plan (NEAP) as well as a contribution of ¾% (.75%) of gross payroll under the Teledata Agreement to "Apprenticeship and Training." The expired agreement had no provision for contributions to a training fund. There was no memorandum directing the payroll clerk to make the increased NEAP contributions or the training contributions. When asked to account for increasing the payment to NEAP from 8% to 10%, as reflected in the General Counsel's Exhibits, Henshue answered, "I have no idea why it changed to 10 percent."

General Counsel's Exhibits 18(i) and (j) reflect that the Company reverted to the 8% rate and quit making the training contributions as of the week ending March 27. As the General Counsel points out, the report that included the last week of March covered a four-week period ending on April 24 and it was not received by the Union until May 18. Thus the report could not have been prepared before April 24, a Saturday. The receipt by Union on May 18 suggests, as argued by the General Counsel, that the report, which does not reflect the date that it was prepared, was prepared after the Company learned of the decertification petition that was filed on April 27. Payroll clerk Schuchardt did not testify.

C. Credibility

The outcome of this case is dependent upon the credibility of Koehler and Henshue. I find it unfortunate that what appears to have been an effective collective bargaining relationship has degenerated into a dispute with regard to who agreed to what.

Koehler's testimony was clear and responsive. The Respondent disputes Koehler's testimony that the parties reached agreement upon a collective-bargaining agreement "in and hour and a half or so" on January 19 and contends that the Union, "for the first time," asserted that a collective-bargaining agreement had been reached after the decertification petition was filed. The foregoing argument overlooks the listing of the eight items to which, as hereinafter discussed, the parties agreed on January 19 and which Koehler set out in a separate listing when sending Henshue, on February 3, the collective-bargaining agreement that incorporated those items. The introductory paragraph to that listing, dated February 2, states: "Listed below are *the negotiated changes agreed to* and updated in the Henshue Teledata Agreement." [Emphasis added.]

Henshue's demeanor was unimpressive and his recollection was often vague. His assertions of not giving any "feedback" and leaving matters "unresolved" are belied by the

agreements he acknowledged making: a two-year contract, a wage freeze with a reopener, and contributions to the Great Lakes Training Trust Fund. Although Henshue testified, regarding the Lineco health insurance premiums, that he "did not understand this issue to be closed out," he did not specifically deny agreeing to pay the premium increases through January 1, 2005, and addressing further adjustments during the wage reopener to which he acknowledges the parties agreed.

Henshue asserted that payroll clerk Schuchardt acted upon documents that she received from Lineco and denied that he informed her of the changes in contributions to which he denies having agreed on January 19. Even if Schuchardt acted on the basis of the document received from Lineco regarding the health insurance premium increase, the increase in contributions to the National Electrical Annuity Plan and the contribution to Apprenticeship and Training are determined by the collective-bargaining agreement and are explained only by the changes in the agreement to which Koehler testified Henshue agreed. When confronted with the documentary evidence reflecting that the increase to 10 percent was being paid in early 2004, Henshue answered, "I have no idea why it changed to 10 percent." I do not credit that testimony.

Although Henshue testified that he had no attorney present for negotiations because the Company was "trying to save money" and it could not afford "to pay the attorneys we had," he asserts that he informed Koehler that he intended to have an attorney review any proposed agreement. It appears that Henshue considered Auen to be his attorney in late January because he "had to call our attorney" to obtain the electronic copy of the prior agreement. That attorney was Auen. I shall not speculate regarding when or what occurred that resulted in the determination to have the collective-bargaining agreement reviewed by an attorney. I shall also not speculate regarding why Gary Henshue's brother, Thomas Henshue, who had been associated with the same firm as attorney Michael Auen, selected a new law firm. I credit the testimony of Koehler that, prior to meeting on January 19, Henshue informed him that he would not be using an attorney. I credit Koehler's testimony that nothing was said regarding involving an attorney until late February or early March when Henshue finally returned his telephone calls inquiring why the collective-bargaining agreement had not been signed and returned and, at that time, informed him that the Company had retained a "new law firm."

D. Analysis and Concluding Findings

The complaint alleges that the Respondent, since February 3, has failed and refused to sign an agreed upon contract. The General Counsel argues that the parties agreed upon all terms of the collective-bargaining agreement on January 19, and that the Respondent's failure to sign the agreement, when sent on February 3, violated the Act.

The Respondent argues that "the parties failed to reach agreement" in their "short" meeting on January 19. The duration of the negotiations proves nothing. Insofar as all matters were resolved on January 19, it is obvious that resolution took only one bargaining session. Henshue admitted that, at the close of the meeting, no further negotiating sessions were scheduled. I credit Koehler that when, after sending voice mails regarding the return of the agreement, Henshue informed him that he was having the agreement reviewed by an attorney, he responded that he was frustrated "because I was under the understanding that we did have an agreement." In discrediting Henshue's testimony that Koehler was frustrated "because he wanted to get the negotiations further along," I agree with the argument of the General Counsel that "there was nothing left to be negotiated."

Henshue sent Koehler a facsimile copy of the memorandum he received from his new

attorney. I credit Koehler that, in their conversation while Koehler was at an airport, Henshue stated that he "was simply looking for clarification to give to his attorney." Henshue did not testify that he ever asserted to Koehler that he had not agreed to each of the eight changes that Koehler had included with the collective-bargaining agreement. Those changes, "the negotiated changes agreed to," were listed on the memorandum dated February 2 that was sent with the collective-bargaining agreement on February 3. Although the Respondent characterizes the meeting on April 13 as a bargaining session, Koehler's credible testimony establishes that he simply agreed to meet to give Henshue any clarification he wanted regarding the matters mentioned in the memorandum from the new attorney. Persuasive evidence that this meeting was not a bargaining session is the undisputed evidence that Henshue offered no counterproposals, nor did he dispute to Koehler that the Respondent and Union had agreed upon the terms of their collective-bargaining agreement on January 19. When the matter of crew leaders was discussed, a development that had occurred in bargaining with Henshue's competitors after January 19, Koehler offered, and Henshue accepted, the offer of a side letter, an action totally consistent with the existence of a collective-bargaining agreement.

The Respondent notes that Koehler's letter of October 28, 2003, refers to approval of the agreement by the International Union. Although the letter does so, there was no mention of such approval in bargaining nor was there any provision in the agreement requiring such approval. The parties had abided by their prior agreement which also made no reference to approval by the International. Any protocol for approval by the International was a self-imposed matter internal to the Union. There is no evidence that "any of the parties believed that the International's approval was a condition precedent to a final and binding agreement." *Auto Workers Local 365 (Cecilware Corp.)*, 307 NLRB 189, 14 (1992). See also *Buschman Co.*, 334 NLRB 441, 443 (2001). Neither Koehler nor Henshue mentioned it in any meeting.

The Union, in the attachment to its letter of February 3, had listed the "negotiated changes agreed to and updated in the Henshue Teledata Agreement" which was also attached. The Respondent did not immediately respond that there had been no agreement, that Koehler had concocted a document that incorrectly reflected agreements that had not been reached on January 19. The Respondent argues that there is no evidence of "any motivation to deny an agreement if one had been reached." The first denial of an agreement on this record is the Respondent's answer. Motivation is immaterial. The Section 8(a)(5) violation is predicated upon the Respondent's failure to fulfill its obligation by signing the agreement.

In its brief, the Respondent faults the Union for not sending a "cordial written statement … which set forth the Union's position that Respondent had failed to acknowledge its obligation." Rather than a written statement, Koehler left voice mail messages for Henshue. When Henshue finally responded to Koehler's telephone calls, he informed Koehler that he had a "new law firm" to which he had submitted the contract. Koehler stated that he understood that they had an agreement. Although testifying that he had not agreed to various items in the contract, Henshue never asserted that he informed Koehler that he disputed that there had been full agreement. Koehler agreed to meet with Henshue on April 13 to clarify any questions. In that meeting, Henshue made no contention that the parties did not have a full and complete agreement, and he offered no counterproposals. He stated that he would sign the document and return it by the end of the day. Henshue asserted that he did not get back to Koehler because "it just was not a big priority for us." In asserting the absence of a "priority," Henshue did not assert that the Respondent disputed that there was an agreement.

The Board has long held that "Section 8(d) of the Act explicitly requires the parties to a collective bargaining relationship to execute 'a written contract incorporating any agreement reached if requested by either party.'" *Flying Dutchman Park, Inc.*, 329 NLRB 414, 422 (1999),

citing *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). I find that the parties reached full and compete agreement regarding a two-year collective-bargaining agreement on January 19 and that the Respondent, by failing and refusing to execute that agreement since February 4, 2004, violated Section 8(a)(5) of the Act.

Conclusions of Law

By failing and refusing to execute an agreed upon contract, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully failed and refused to execute the collective-bargaining agreement it had reached with the Union on January 19, 2004, must execute the agreement and make all contractually-required contributions to the benefit funds that it has failed to make since the effective date of the bargaining agreement, including any additional amounts applicable to such payments or contributions as set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).[2] The Respondent must also reimburse unit employees for any expenses ensuing from its failure to comply with the provisions of the collective-bargaining agreement relating the Line Construction Benefit Fund as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[3]

ORDER

The Respondent, Henshue Construction, Inc., Madison, Wisconsin, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the International Brotherhood of Electrical Workers, Local 2150, as the exclusive representative of all construction employees, including general foremen, employed by Respondent in its telecommunications division in the State of Wisconsin by failing and refusing to execute the collective-bargaining agreement to which the parties agreed on January 19, 2004.

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[2] The Respondent, having made several payments consistent with its contractual obligation, is liable only for the payments that it failed to make.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the collective-bargaining agreement reached by the parties on January 19, 2004.

(b) Make all contractually required contributions to the benefit funds that it has failed to make since the effective date of the collective-bargaining agreement, including any additional amounts due to the funds on behalf of the unit employees, and reimburse any affected employees in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at all of its facilities at which employees are represented by the Union, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 4, 2004.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 15, 2004

George Carson II
Administrative Law Judge

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD(ATL)–63–04
Milwaukee, WI

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local 2150, as the exclusive bargaining representative of our construction employees, including general foremen, who are employed by us in our telecommunication division in the State of Wisconsin by failing and refusing to execute the collective-bargaining agreement to which we agreed on January 19, 2004.

WE WILL execute and implement the collective-bargaining agreement to which we agreed on January 19, 2004, and WE WILL give retroactive effect to that agreement and make all contractually-required contributions to the benefit funds and reimburse any of you affected by our failure to make those contributions as set forth in the remedy section of the decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

HENSHUE CONSTRUCTION, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

310 West Wisconsin Avenue, Federal Plaza, Suite 700, Milwaukee WI 53203-2211
(414) 297-3861, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-3819